IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 32.

In the Matter
of the
Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Charterer of the steamship "VENICE MARU", for Exoneration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,
Cargo Claimants-Petitioners,

vs.

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONERS.

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EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

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Introduction.

Respondents contend (1) That the intent of Congress was that the Fire Statute should be applicable to suits *in rem* as well as to suits *in personam;* and (2) that the contract involved in this litigation was not in fact a master's contract although it appeared to be so on the face of the bill of lading.

(1) It is noteworthy that respondents quote from the case of *The Main* v. *Williams*, 152 U. S. 122, on the question of intent. It is equally noteworthy that they omit from their quotation the extended discussion which appears at pages 132-133 of 152 U. S. in the opinion in that case. There this Court took occasion to say, regarding the proper construction of this very statute, that it should be construed strictly in so far as it derogated from the legal rights of individual parties, and that there was nothing in the statute to require a construction more favorable to the shipowner than the plain meaning the words import. We discuss this case in greater detail *infra*, at page 11. We submit that, as we argue in our main brief, the intent of Congress as to the meaning of the statute is clear from the words of the statute itself and from a reading of Section 1 along with other sections of the statute. In these other sections Congress made it entirely plain that it did not intend by the Act in any way to exempt a master from liability for his contracts or for his negligence or for failure to perform his contracts.

(2) The circumstance that the statute specifically provides, in Section 6, that the master shall not be excused for his failures or derelictions, so disturbs the respondents that they devote their second point to a futile attempt to show that the bills of lading involved in this case, in so far as they were signed "for master", should be disregarded. They make this argument notwithstanding the fact that, as found by the Court below, "all the cargo involved had been shipped on board the S. S. 'Venice Maru' in apparent good order and condition, for carriage pursuant to the terms and conditions of certain negotiable bills of lading, duly issued either by the head office of the petitioner, Kawasaki Kisen Kabushiki Kaisha, or by one of its sub-offices, or by its duly authorized agents" (Finding 3, R. 40-41), and in spite of the fact that the bills of lading (Exhibit 9, R. 30) were

signed "for master". Respondents seek to avoid the effect of this contract by arguing that if the Court gives the bills of lading the meaning for which we contend, the Court is presented with an unreal situation.

If by unreality respondents mean that the "K" Line was the real party in interest, because it stood to gain any profit to be made by the transaction, and that the master as a party to the contract should be ignored, we submit that such argument is opposed to the well-settled authority on the subject. Respondents ask this Court to ignore the words "for master" which appear plainly on all these negotiable bills of lading, and deal with the case as if those words did not exist.

In fact, respondents are driven to take the extreme position (p. 27) that "there is no such thing as a master's contract of affreightment; he is always acting as an agent, either for the owner or the charterer and the contract is that of his principal" (p. 27 of respondents' brief). This statement is squarely contrary to the settled law on the subject. See *The Phebe*, 1 Ware 263, Fed. Cas. No. 11,064, discussed both in our main brief and hereafter at pages 22-3, and the approval specifically given the holding in that case by this Court in *Schooner Freeman v. Buckingham*, 18 How. 182, at page 189, where this Court said:

> "We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner" (p. 189 of 18 How.).

See also *Gans S. S. Line v. Wilhelmsen (The Themis)*, 275 F. 254, where it appears (p. 258) that Barber & Co.,

who were charterers, had issued to shippers bills of lading signed by them "For the Master". In discussing the effect of these bills of lading, Judge Hough, speaking for the Circuit Court of Appeals for the Second Circuit, said (p. 262):

> "But when (Barber & Co.'s authority to sign for the master being undisputed) the master of a ship chartered but not demised, which was the condition of Themis, issues bills of lading, we hold that *the contract evidenced thereby is not only the ship's contract*, and that of the time or other charterer who caused their issue, but that of the owner, whose master (i. e., authorized agent) issued the same. Therefore in this instance the shippers had, *beyond the obligation of the ship*, the right to look to all three respondents and hold any or all of them personally liable for right fulfillment of the bills" (p. 262 of 275 F.). (Italics ours.)

In the *Gans Line* case, *supra*, Judge Hough cited *Tillmans* v. *Knutsford*, 13 Com. Cas. 244, 334, and *Manchester Trust* v. *Furness*, 8 Asp. M. C. 57. In the *Tillmans* case, *supra* (also reported in (1908) 1 K. B. 185, aff'd (1908) 2 K. B. 385 (C. A.), aff'd (1908) A. C. 406—H. L.), one of the bills of lading (the fourth) was physically signed by the time-charterer, but following the signature appeared the words: "For Captain and Owners". With regard to the effect of such signature, Channell, *J.*, said (p. 191):

> "I am of opinion that the effect of their so signing is exactly the same as if they had directed the captain to put his name to the bill of lading and he had accordingly signed it. If they had struck out the words 'for the captain and owners,' and then signed it, I think they would, on the face of it, have been purporting to make it their own contract; but they did not purport to make it their own contract. They

purported to sign it for the captain and owners; and, therefore, to make it the contract of the captain and owners, and they had absolute power to do that by the terms of the charterparty. Consequently the objection taken on behalf of the defendants to their signature fails. The objection would have been good if the captain's hand did not bind the owners, but for the reasons I have given I am of opinion that the fourth bill of lading is exactly on the same footing as the other three" (p. 191 of (1908) 1 K. B.).

The other three had been signed by the master in person. All three Judges in the Court of Appeal agreed with the foregoing. (See pp. 393-4, 406, and 406-7 of (1908) 2 K. B.) The judgment was unanimously affirmed by the House of Lords (1908 A. C. 406). Lord Loreburn, *L. C.*, thought the owner's defense on this point "destitute of merits" (p. 408); Lord Macnaghten thought it "ought not to have been raised" (p. 408); and Lord Dunedin was "content with the judgment of Channell, *J.*" (p. 410) on this point.

In *Manchester Trust Limited* v. *Furness Withy & Co.*, 8 Asp. M. Cases 57, at p. 60, the Court of Appeal pointed out that the usual time charter (and that was the case in the case under decision) contains a provision that "In signing bills of lading it is expressly agreed that the captain shall only do so as agents for the charterers, etc.". There is no such provision in the charter in this case (Ex. 17, R. 31-33). The situation here is precisely the same as it was in the *Schooner Freeman* v. *Buckingham*, 18 How. 182, and in *The Phebe*, 1 Ware 263, Fed. Cases No. 11,064, where the master derives his authority not from the common or civil law of agency, but from the Maritime Law which vests the master with authority in his quality as master. When the master permits the charterer to sign for him, the bills of lading, as was held in *Gans S. S. Line* v. *Wilhelmsen*, 275 Fed. 254, 262,

are still the ship's contracts. Whether he is still the agent of the owner or charterer is for our purposes of no consequence, because no right asserted under the common or civil law is now before the Court. The *in rem* liability of the "Venice Maru" arises from the maritime law.

See also *Wilston S. S. Co., Ltd.* v. *Andrew Weir & Co.*, 31 Com. Cases 111, at pp. 116-7.

In short, the law is well settled that a bill of lading with the clause "For Master" below the signature binds the master and the ship itself irrespective of whether it is physically signed by him in person or by a charterer or other person acting on his behalf.

The Court below found that the bills of lading in the case at bar are negotiable documents (Finding 3, R. 40-41). There is not a line of evidence anywhere in the case to show that any of the petitioners had any reason to believe that the bills of lading were in any way simulated contracts; on the contrary, it has been stipulated that some of the petitioners were "the owners and holders for value of the bills of lading" (R. 23). Negotiable documents in the hands of innocent holders should not be lightly repudiated; and, as here, when there is not the slightest ground for repudiation, fair dealing requires that the contract should be enforced as written. We shall deal with respondents' argument under this heading in greater detail below at pages 22-3 *infra*.

Reply to Respondents' Point I.

Point I of respondents' brief is the only one in which they actually discuss the terms and meaning of the Fire Statute. It consists of four subdivisions; we shall discuss them seriatim:

Subdivision A (page 5) reads: "The language is plain and should be construed liberally." We agree with the first part of this statement. The language is indeed plain. It refers only to the liability of the owner. Respondents' contention is that the word "owner" by some philological legerdemain means "owner *and vessel*". In support of such construction, they rely upon a quotation (p. 6) from the majority opinion* written by Mr. Justice Bradley in *The City of Norwich*, 118 U. S. 468, 503. The reasoning of the lower Court in the instant case (R. 63) is essentially but a paraphrase of that quotation. We have, therefore, made a careful analysis of the decision in *The City of Norwich* case and of the language in question and print the same as an Appendix to this brief. We therein show that the actual decision of this Court in that case does not support the contentions made by respondents in the case at bar and that their interpretation of the language used by Mr. Justice Bradley at page 503 of the majority opinion in that case is squarely contrary to the well-settled principles of admiralty law as laid down in both prior and subsequent authorities which fully support your petitioners' position herein.

We also believe that the opinion of this Court in the "*City of Norwich*" case, *supra*, should be read and interpreted in the light of the opinion in the companion case of *Norwich Co. v. Wright*, 13 Wall. 104. Mr. Justice Bradley, writing for this Court, there pointed out (p. 116) that to reach a true construction of the Act of March 3, 1851, a review of the laws of other countries would be helpful and he then said (p. 116):

> "The history of the limitation of liability of ship-owners is matter of common knowledge. The learned opinion of Judge Ware in the case of *The Rebecca*, leaves little to be desired on the subject.

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* Justices Matthews, Miller, Harlan and Gray dissented. The dissenting opinion starts at page 528 of 118 U. S.

He shows that it originated in the maritime law of modern Europe; that whilst the civil, as well as the common, law made the owner responsible to the whole extent of damage caused by the wrongful act or negligence of the master or crew, the maritime law only made them liable (if personally free from blame) to the amount of their interest in the ship. So that, if they surrendered the ship, they were discharged" (p. 116 of 13 Wall.).

And he later said (p. 126):

"But it will be observed that the act of Congress contains a provision (Sec. 4) for the shipowner to discharge himself, as in the maritime law, by giving up the vessel and her freight" (p. 126 of 13 Wall.).

In *The Rebecca*, 1 Ware 188, Fed. Cases No. 11,619, a libel *in rem* for the loss of cargo covered by a master's bill of lading, Judge Ware traced the history and origin of the maritime lien and showed that the general maritime law made the owners "severally bound in solido for the acts of the master, whether of tort or contract, but limited the extent of their liability to the value of the ship" (p. 376 of 20 Fed. Cases). He then went on to point out that "the natural consequence of the principle" was "to render the ship herself liable to the creditor in specie" (p. 377); and that the "rule, by which the ship is tacitly hypothecated for the obligations contracted by him (the master), when acting in the quality of master, and within the scope of his authority as such" is a cognate of "the principle of the limitation of the responsibility of the owners for the acts of the master" (p. 378 of 20 Fed. Cases).

Our analysis of the *"City of Norwich"* (Appendix, p. 30) has been based on broad principles applicable to the general question certified. The specific facts of the case at bar afford a still further answer to respondents'

ontentions as based on Mr. Justice Bradley's observa-
ons in *The City of Norwich, supra.* Their contentions
re built on the following quoted language from his
pinion and amount to this: That "in the matter of
ability, a man and his property cannot be separated"
). 503 of 118 U. S.); that "his property is what those
ho deal with him rely on for the fulfillment of *his*
igations" (p. 503—italics ours); that the Fire Statute re-
ases the owner from liability on his obligation; therefore,
at his vessel is likewise released from liability al-
ough not named in the statutory release from liability.
ut this argument ignores the admitted facts of the case
bar. Concededly, the contracts of carriage covering
e cargo which was damaged after loading on board
e "Venice Maru", were executed "For Master" (Exhibit
R. 30 A). These contracts created an obligation under
e maritime law on the part of the master, not on the part
the owner. Under the maritime law, the ship and
eight became hypothecated "for the fulfillment of his
oligation".* The Fire Statute (Sec. 1 of the Act of March
1851) mentions only the owner and not the master; in
ct, Section 6 of that act (now 46 U. S. Code, Sec.
7; see Appendix A, page 45 of our main brief)

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* *The Phebe*, Fed. Cases No. 11,604; *The Rebecca*, Fed. Cases
. 11,619; *The Creole*, Fed. Cases No. 13,033; and *Vandewater*
Mills (*The Yankee Blade*), 19 How. 82, 90, as quoted with
proval by this Court in *Osaka Shosen Kaisha v. Lumber Co.*,
0 U. S. 490, at page 497. See also *Krauss Bros. Lumber Co. v.*
mon S. S. Corp., 290 U. S. 117, at page 121, where the present
ief Justice said that "* * * the cases are agreed that the right
the lien has its source in the contract of affreightment and
at the lien itself is justified as a means by which the vessel,
eated as a personality or as impliedly hypothecated to secure
e performance of the contract, is made answerable for non-
rformance. See *The Freeman*, 18 How. 182, 188; *Vandewater*
Mills, 19 How. 82, 90; *Osaka Shosen Kaisha v. Pacific Export*
mber Co., supra; The Flash, 1 Abb. Adm. 67; *The Rebecca*,
Ware 187; *Scott v. The Ira Chaffee*, 2 Fed. 401" (p. 121 of
0 U. S.), and also that "this engagement of the vessel, or its
pothecation", is to be "distinguished from the personal obliga-
n of the owner" (p. 121 of 290 U. S.).

specifically provides "That nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled against the master * * * for or on account of * * * loss or destruction of goods * * * put on board any ship or vessel * * *". Since the remedy against the master for the breach of his obligations is specifically not affected by the Fire Statute, how can that Statute be construed to exempt the vessel which is tacitly hypothecated "for the fulfillment of his obligation"? It is submitted that under the very reasoning followed by the respondents, the conceded facts of the instant case require a decision in favor of petitioners.

In further support of their contention that the simple words of the statute "no owner of any vessel shall be liable," should be construed as if they read "neither the owner nor the vessel shall be liable",* respondents rely upon extracts (pp. 6-7) from this Court's opinion in *The Queen of the Pacific*, 180 U. S. 49, and from the Circuit Court of Appeals' opinion in *The Kensington*, 94 F. 885, 888. Both those cases involved the proper interpretation to be given clauses in a bill of lading. In both cases the Court was seeking the intent of a contract. The determination of the scope and meaning of a contract provision employed by a vessel owner is manifestly different from the determination of the meaning of an exemption granted by statute. In the former instance, the presumption is strong that the beneficiary of the provision intended to obtain thereby the broadest possible benefits. This was made clear by Mr. Justice Brown in *The Queen of the Pacific, supra*, in the sentences immediately preceding the one quoted by the respondents at

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* Compare Section 4, subdivision 2 (b) of the Carriage of Goods by Sea Act (46 U. S. Code, Section 1304), where Congress did extend exemption to both the ship and the carrier. This is discussed at pages 9 and 12 of our main brief. See also the provisions of the Harter Act discussed at pages 30 and 31 of our main brief.

pages 6 and 7 of their brief. No such presumption exists in respect of the intent behind a statutory exemption in derogation of well-settled liabilities imposed by law. *The Main* v. *Williams*, 152 U. S. 122, at p. 132.

Respondents urge that the statute in question was remedial, and that it therefore should be construed liberally. Their argument is that this liberality should even go to the extent of interpolating the words "and vessel" after the word "owner". In *The Main* v. *Williams*, 152 U. S. 122, at page 132, Mr. Justice Brown, speaking for this Court, took occasion to say that our Act was modeled on the similar English statutes and pointed out that (p. 132):

> "The English courts have held, very properly we think, that these statutes should be strictly construed. As observed by Abbott, *C. J.*, in *Gale* v. *Laurie*, 5 B. & C. 156, 164: 'Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subject of this country at the common law, and *there is nothing to require a construction more favorable to the ship owner than the plain meaning of the word imports*'. To the same effect are the remarks of Sir Robert Phillimore in *The Andalusian*, 3 P. D. 182, 190, and in *The Northumbria*, L. R. 3 Ad. & Ec. 6, 13. Speaking of this statute, Lord Justice Brett, in *Chapman* v. *Royal Netherlands Nav. Co.*, 4 P. D. 157, 184, remarked: 'A statute for the purposes of public policy, derogating to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner. * * * *It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties*'" (p. 132 of 152 U. S.). (Italics ours.)

Moreover, such of the cases as to statutory construction cited by respondents which deal with the Act of March 3, 1851, all concern those sections of the Act dealing with limitation of liability to the value of the vessel and her pending freight, i. e., those sections which incorporated into our law the principles of the general maritime law. We submit that the rule of construction referred to by Mr. Justice Brown in *The Main* v. *Williams, supra,* should be applied to Section 1 of the Act. That section, in contrast with Section 2, does not abridge the right of recovery against the master, nor against the ship hypothecated to secure the performance of the master's contract. Thus the clear statement in Section 6 is that Congress did not intend by Section 1 to relieve the master of his liability for the breach of his contract. Section 6 was applied in *The City of New York*, 25 F. 149, at page 152 (reversed by this Court on other grounds in 147 U. S. 72). The Court there said (p. 152):

> "By the English and American maritime law the master is responsible for the loss of cargo equally with the owners, without reference to any personal fault of his own, but by reason of his accountability for the acts or omissions of his subordinates, as a kind of subrogated principle, says Story, and qualified owner; although his liability is more restricted on public vessels, where he does not appoint his subordinates, and is therefore not responsible for their defaults. *Nicholson* v. *Mounsey*, 15 East, 384; Story, Ag. § 314; *The Limerick*, 1 Prob. Div. 411. It follows that in this case his personal effects must abide the fate of the ship herself, and, like the ship and owners, be held to make up the ship's share of the loss of cargo. The statute of 1851, limiting the liability of owners, excepted all existing remedies against the master, officers, or mariners for loss or injury of cargo. Rev. St. § 4287" (p. 152 of 25 F.).

Thus where cargo has been shipped under a master's bill of lading, the latter's liability for loss or damage thereto, even when caused by fire, remains unaffected by the Act of March 3, 1851. How then can it be said that the vessel of which he is master and which by the settled maritime law is hypothecated for the performance of his contract, is exonerated from liability *in rem* by Section 1 of the Act which in specific terms provides only that the owner shall not be liable? If the Fire Statute does not under such circumstances divest such a maritime lien, why should it be construed impliedly to include the vessel in its terms and thus to divest any other valid maritime lien for cargo damage? As we shall point out below, respondents admit at page 24 of their brief that "there was a maritime lien upon the 'Venice Maru' for damage by fire to her cargo" even under their interpretation of the bills of lading in this case.

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Subdivision B of respondents' Point I (p. 8) asserts that "the legislative history of the statute shows that the intention was to completely exonerate shipowners from liability for loss or damage to cargo by fire unless caused by their personal design or neglect." In this connection they point out that the Act of March 3, 1851, was modeled on the English statutes limiting the liability of vessel owners. They later assert that in view of this fact, the same construction should be given the American statute as that given the English statute. We concede that, as in England, so in this country, complete exoneration has been given the vessel owner *in personam* when the fire is not due to his design or neglect. The latest ruling of this Court on this point is *Earle & Stoddart v. Wilson Line*, 287 U. S. 420. But it is to be noted that respondents fail to cite any English case holding that the English Fire Statute divests maritime liens. We also agree (see p. 8 of our main brief) that the litigation arising from the loss of the Steamboat "Lexington" brought the sub-

ject of limitation of liability forcibly to the attention of Congress. The abbreviated quotation at page 9 of respondents' brief from *The Main* v. *Williams*, 152 U. S. 122, at page 127, fails, however, to make it clear that that litigation (*New Jersey Steam Navigation Co.* v. *Merchants Bank*, 6 How. 344) was an action *in personam* and did not in any way deal with the vessel's *in rem* liability, but merely held that the owner was personally liable without limitation for losses by fire due to the negligence of his servants.

Respondents also refer to the Senate Proceedings which are to be found in *23 Congressional Globe*, pages 317, 331, 479, 713, 738 and 816. It is to be noted that the references during the debate, and also in the later discussions of the Act in this Court,* all refer to *common law liability*. No mention was made in the Senate of any change in the maritime law to be made by the Act. That law had from the earliest times given a right *in rem* against the ship for cargo damage. On the contrary, Senator Hamlin, the main proponent of the Bill, in explaining the provisions of the Act and particularly those of Section 5 as originally drafted, significantly said that "His vessel is in hazard in any event" (23 Congressional Globe, p. 715, column 2). Any ambiguity on this point was later clarified by amending Section 5 before passage, by adding thereto the provision that "and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof" (23 Congressional Globe, p. 777, column 3).

Thus, we submit that the legislative intent is made clear by the other sections, viz., by Section 5, where, as we have

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* For example, see *Walker* v. *Transp. Co.*, 3 Wall. 150, 153; *Prov. & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 603-4; *Craig* v. *Continental Ins. Co.*, 141 U. S. 638, 646-7; *The Main* v. *Williams*, 152 U. S. 122, 134. As Mr. Justice Grier pointed out in *The Yankee Blade*, 19 How. 82, at p. 89, an action *in rem* to enforce a maritime lien "is unknown to the common law, and is peculiar to the process of courts of admiralty".

just pointed out, Congress was careful to provide that the "vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof" (now 46 U. S. Code, Section 186) and also by Section 6, discussed at pp. 12-13, *supra*.

* * * * * * *

Subdivision C of respondents' Point I (p. 12) deals with various cases in this Court where reference has been made to the Fire Statute. The first such case is *Moore* v. *American Transportation Co.*, 24 How. 1. That was an appeal from the Supreme Court of Michigan and merely held that the Fire Statute applied to an owner of a vessel used in interstate commerce on the Great Lakes. Being an action *in personam* in the state court, no question of *in rem* liability was involved.

The next case is that of *Walker* v. *Transportation Co.*, 3 Wall. 150. That was a libel *in personam* for loss of cargo by fire, and involved only two questions, viz.: "1. Whether the owner of a vessel used in the trade on the lakes is liable, independently of contract, for a loss by fire, which occurs without any design or neglect of the owner; although it may be traced to negligence of some of the officers or agents having charge of the vessel? 2. Whether the special contract set up by the respondent, although admitted by the libellants, was founded on a custom which the law would support, and whether or not, therefore, the case was to be governed by the Act of 1851?" (p. 152 of 3 Wall.). The special contract relied upon there by the cargo owners to take the case out of the Fire Statute* was that the bill of lading exception of

* At that time the Fire Statute contained a proviso to the effect "that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of such owner" (pp. 153-154 of 3 Wall.).

"perils of navigation and perils of the sea" was interpreted by the usage in that trade to mean that the owners were "responsible for the negligence of their officers in case of fire" (p. 154 of 3 Wall.). This Court said (p. 155):

> "We do not believe, then, that the special contract set up by respondent, founded on usage, although admitted by the libellants, is founded on a custom which the law will support, and therefore the case must be governed by the act of 1851" (p. 155 of 3 Wall.).

Thus here again only *in personam* liability of the owner was involved; and the Court itself refers to the "shipowner's *common law* liability". No question of maritime liens was in any way presented, and the case is entirely different from the instant case. This Court in *Schooner Freeman v. Buckingham*, 18 How. 182, at pp. 189-190, held that the customs and usages of the maritime law which create a maritime lien growing out of a master's contract of carriage are supported by our law.

Following their reference to the *Walker* case, *supra*, respondents at page 13 of their brief state that *Craig* v. *Continental Insurance Co.*, 141 U. S. 638, is "to same effect". The *Craig* case in no way involved the Fire Statute, but merely concerned Section 3 of the Act of 1851.

At page 13 respondents also quote from *Norwich Co.* v. *Wright*, 80 U. S. 104, which we have already discussed at pages 7-8, *supra;* and it is sufficient to point out at this place that it involved only the question of the personal liability of the owner and the effect of Section 3 of the Act thereon. The reference to the Fire Statute quoted by respondents at page 13 of their brief was pure dictum.

Respondents next cite (p. 13) *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, and quote from Mr. Justice Bradley's opinion therein. This case was an

appeal from the Supreme Judicial Court of Massachusetts. The question actually presented for decision concerned the common law liability of the vessel owner *in personam*, not any *in rem* liability of the vessel under the maritime law,* and was whether a common law action to enforce such personal liability was superseded and stayed by a limitation proceeding in admiralty wherein a stipulation for the value of the vessel had been filed. Under these circumstances the language in question should be construed to apply only to the *in personam* liability of the vessel owner; in fact, this is all that Mr. Justice Bradley actually said. If his dictum is deemed to include the ship's *in rem* liability also, such extension can be made only on the basis of treating an admiralty action *in rem* to enforce a maritime lien as merely another means of enforcing the vessel owner's personal liability. Such a

* This is made abundantly clear in the dissenting opinion of Mr. Justice Field with whom Mr. Justice Gray concurred. He said (pp. 603-4): "The object of the act was *to change the rule of the common law* as to the liability of the owners of vessels for losses and injury, to which they did not contribute, either designedly or by their neglect, but which were attributable entirely to the acts or omissions of their officers or employees. *The common law* placed a burdensome responsibility upon the owners for the acts or omissions of their agents or servants without their knowledge or assent; and to lighten this responsibility the statute in question was passed" (pp. 603-4 of 109 U. S.). (Italics ours.) The foregoing is not an isolated expression of the purpose of the Act. For example, Mr. Justice Miller in *Walker* v. *Transportation Co.*, 3 Wall. 150, at p. 153 (a fire case), pointed out that the Act was "intended to modify *the shipowner's common law* liability for everything but the act of God and the King's enemies". See also *Craig* v. *Continental Ins. Co.*, 141 U. S. 638 at pp. 646-7 and *The Main* v. *Williams*, 152 U. S. 122, at p. 134. We know of no case where this Court has specifically stated that the Act affected liabilities created by the maritime law. On the contrary, this Court has frequently stated that the Act merely brought our law into harmony with the general maritime law. For example in *Norwich Co.* v. *Wright*, 13 Wall. 104, Mr. Justice Bradley said at p. 127: "We do not hesitate to express our decided conviction, that the rule of the maritime law on this subject, so far as relates to torts, was intended to be adopted by the Act of 1851" (p. 127 of 13 Wall.). See also *The Scotland*, 105 U. S. 24, at p. 29.

concept can only rest upon common law doctrines which, as we have shown in our analysis (Appendix, at pp. 36-9) of Mr. Justice Bradley's other remarks in *The City of Norwich*, are different from, and to be distinguished from, the well-settled principles of maritime law.

* * * * * * * *

Subdivision D of respondents' Point I (p. 16) deals with the interpretation given by certain lower courts to the Fire Statute in conflict with the ruling of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232; certiorari denied, 280 U. S. 603. The following analysis of the opinions of those cases demonstrates that such decisions were ill-considered.

Dill v. *The Bertram*, Fed. Cases No. 3910 (S. D. N. Y.—1857). The quotation used (p. 17) by respondents is mere dictum; the dismissal of the libel *in rem* was apparently based on the fact that no maritime lien existed since the goods damaged by fire had not yet been loaded on board the vessel. This is in accord with this Court's ruling in *Osaka Shosen Kaisha* v. *Lumber Co.*, 260 U. S. 490.

Keene v. *The Whistler*, Fed. Cases No. 7645 (D. C. Cal.—1873). This was a libel *in rem* for a loss by fire alleged to have been caused by the negligence of a master who was also part owner. Judge Hoffman there said:

> "The circumstance that the master owned an eighth interest in the vessel can have no effect to enlarge the liability of his co-owners. This point was expressly adjudged by the King's bench under the English statute. *Wilson* v. *Dickson*, 2 Barn & Ald. p. 13" (p. 209 of 14 Fed. Cas.).

The *Wilson* case (106 Eng. Reprints 268) was a common law action against several co-owners of a ship for loss caused by an alleged improper sale of cargo by the

master who was also a part owner. The Court merely held that "the circumstance of the loss being occasioned by his (the master's) fault, and with his privity, will not take away from the other part owners the protection" of the English statute limiting liability to the fixed value of the ship. After pointing out that the principle was approved in *The Volant*, 1 W. Rob. 383,* Judge Hoffman continued:

> "From these authorities it results that, though the negligent master, who is a part owner, is liable personally in either capacity for the loss caused by his negligence, the other innocent part owners are protected by the statute, in a suit brought against all the part owners jointly or *in rem* against the vessel, where the property must necessarily be taken to satisfy the decree; or, if she has been bonded, the owners must satisfy the decree out of their own funds" (p. 209 of 14 Fed. Cas.).

It is thus clear that Judge Hoffman adopted the English concept as to the nature of a maritime lien which radically differs from that laid down by this Court (see pp. 26 and 33 of our main brief) and treated it as a mere *jus ad rem* valid only to enforce a personal liability on the part of the owner.

The Rapid Transit, 52 Fed. 320 (N. D. Wash.—1892), a District Court decision, gives no reasons for its conclusion and cites no supporting authority.**

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* *The Volant, supra* (166 Eng. Reprints 616) was an action for collision damages where the ship was held liable, but no decree was allowed against "the part owner personally for the excess of damage beyond the proceeds of the ship".

** Incidentally Judge Hanford went on to allow recovery in general average although the facts of the case (*i. e.*, that the damage by water which extinguished the fire arose from the scuttling of the vessel by the Seattle Fire Department), gave no right to recover in general average under the rule laid down in *Ralli* v. *Troop*, 157 U. S. 386.

In *The President Wilson*, 5 F. Supp. 684 (N. D. Cal.—1933), another District Court decision, Judge St. Sure wrote no opinion in confirming the Commissioner's report. The Commissioner deemed the Circuit Court of Appeals ruling in *The Etna Maru*, 33 F. (2d) 232, to have been disapproved by this Court in *Earle & Stoddart* v. *Wilson Line*, 287 U. S. 420 (see note on p. 7 of our main brief) and preferred to follow *The Rapid Transit*, *Keene* v. *Whistler*, and *Dill* v. *The Bertram*, discussed *supra*.

In *The Munaires*, 12 F. Supp. 913 (E. D. La.—1935), still another District Court decision, Judge Borah relied on the language in the *Hill* case, discussed *supra* at pages 16-8, and refused to follow *The Etna Maru*, *supra*, for two reasons; namely (1) that it had been overruled by this Court in the *Earle & Stoddart* case, *supra*, and (2) that the "bills of lading contained an express contract making the Fire Statute a defense". As to the latter, it is submitted that the mere incorporation of a provision that the bill of lading shall be subject to a statute does not operate to enlarge the scope of the statute itself.

In *The Buckeye State*, 39 F. Supp. 344 (W. D. N. Y., 1941), likewise a District Court decision, Judge Knight felt that *The Etna Maru*, *supra*, had been "disapproved" in *Earle & Stoddart*, *supra*, and so followed *The Rapid Transit*, *supra*. Incidentally, his remarks constitute dicta since he went on to find (p. 349) that "the damage was caused by 'heat' and without 'fire'."

Furthermore, none of the foregoing cases in any way discusses the legal proposition that when a master makes a lawful contract for the carriage of goods, such a contract creates an *in rem* liability on the part of the ship separate and distinct from any *in personam* liability on the part of her owner. *The Phebe* and other cases discussed at pages 23-25 of our main brief. The foregoing

District Court cases relied on by respondents all treat the ship's *in rem* liability as being only co-extensive with, and to be measured by, the owner's liability *in personam.**

Under this subdivision respondents also refer to two cases decided by the Circuit Court of Appeals for the Second Circuit to which this writ of certiorari is directed, viz., *The Salvore*, 60 F. (2d) 683, and *The Older*, 65 F. (2d) 359. As opposing counsel admits (p. 20), the point here involved does not appear to have been specifically brought to the Court's attention in either of those cases.

* * *

In summary of this Point, we submit that the express exclusion of the master's liability from the operation of the statute clearly shows a legislative intent to exclude from the operation of the Act the accompanying hypothecation of the ship to secure the proper performance of that contract.

Reply to Respondents' Point II.

Point II of respondents' brief (p. 24) is devoted to an attempt to explain away and render nugatory the

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* Contrast the cases where the Court has recognized the maritime lien as being a *jus in re*. Thus, in *The Young Mechanic*, 2 Curt. 404, Fed. Cases No. 18,180, from which we quoted at pp. 20-21 of our main brief, Mr. Justice Curtis ruled that "The inability to maintain a suit against the administrator, and the incapacity to make any attachment of the property of the deceased in such a suit, though they may amount to infirmities in the remedy when pursued in the state courts, do not affect the right of the creditor, nor his remedy in the admiralty" (p. 876 of 30 Fed. Cases). And in *The Home*, 18 N. B. R. 557, Fed. Cases No. 6657, discussed in more detail at p. 40, note, *infra*, Judge (later Mr. Justice) Brown, in enforcing the maritime lien, said: "* * * there are in fact three independent though not joint debtors in this case, viz: the charterer, the vessel, and the master, and the release of one does not impair the remedy against the others" (p. 447 of 12 Fed. Cases). See also *The Spartan*, 1 Ware 130, Fed. Cases No. 11,246, and *The Chester*, 25 F. (2d) 908, 910.

specific provisions of the bills of lading issued to cover the cargo loaded on the "Venice Maru". The bill of lading form is printed in the record as Exhibit 9 (R. 20). Even aside from the rule that the terms of a contract are to be most rigidly construed against the party drawing it up, this attempt wholly fails.

Respondents first stress the fact that "the bills of lading were *signed* by the head office or the sub-offices or duly authorized agents of said respondent bareboat charterer" (p. 25), and in support refer to their own answers to interrogatories. We do not deny this fact that the physical execution was made by the "K" Line or its authorized agents.* But neither are the respondents able to deny—and in fact at pages 25 and 26 they specifically admit—that the executory clause in the bill of lading reads: "In witness whereof the owners or *Agents of the said vessel* have signed * * *" (italics ours). (Exhibit 9, R. 30 A.) They further concede, as indeed they must, that underneath the signature appear the words: "for master". As we have pointed out in our main brief (p. 17), the very purpose of execution of this form is to bind the vessel *in rem* as security for the performance of the contract of carriage. Faced with this binding effect upon the vessel of a bill of lading executed in this form, respondents now seek in effect to expunge from these negotiable bills of lading (Finding 3, R. 40, 41) the phrase "for master" and render it wholly nugatory. A similar attempt was made by the vessel owner in *The Phebe*, 1 Ware 263, Fed. Cas. No. 11,064, after Judge Ware had there ruled that a master's contract bound the vessel *in rem*, irrespective of any lack of personal liability of her owner. Judge Ware filed a supplemental opinion dealing with the owner's

* This was also the case in *Gans Line S. S. Co.* v. *Wilhelmsen* and other cases discussed at pp. 3-6, *supra*. See also page 17 of our main brief.

efforts there to explain away the form of the bill of lading, and he said:

> "But is there any evidence that this was not a bona fide contract of affreightment? It is proved by a bill of lading in the usual form. Though this is not binding and conclusive with respect to third persons, it is, with respect to them, evidence of a high character. It may be impeached; but it is not lightly to be presumed that parties, who put their contracts into writing with all the usual forms and solemnities which belong to it, intend a different contract from that which the written agreement plainly expresses. It belongs to him who impeaches it to show by satisfactory evidence that it is a simulated contract" (p. 423 of 19 F. C.).. (See also p. 60 of Appendix C of our main brief.)

Respondents go on to assert that under the common law rules as to agency, the "K" Line was also bound *in personam*, since the master was the employee of the "K" Line. But what of it? As was said by Judge (later Mr. Justice) Brown in *The Home*, 18 N. B. R. 557, Fed. Cases No. 6657, when an owner and a charterer and the vessel are all bound, "the release of one does not impair the remedy against the others" (p. 447 of 12 Fed. Cases).

The language quoted by respondents (p. 26) from this Court's decision in *Pendleton* v. *Benner Line*, 246 U. S. 353, is not contrary to our contention that this form of bill of lading binds the vessel *in rem.* That case merely holds that the cargo owners could also sue the charterer *in personam* "if they had elected to sue it" (p. 355 of 246 U. S.). See also *Gans Line S. S. Co.* v. *Wilhelmsen, supra*, at pp. 3-4, and the other cases there cited and also those cited at page 17 of our main brief.

In fact, respondents' main argument (p. 29 *et seq.*) is built upon the existence of this *concurrent* liability *in personam* of the "K" line in this case. Its contention that

such *in personam* liability is the measure of the vessel's liability *in rem* rests upon the reasoning of the lower Court herein as set forth in the quotation at page 30 of respondents' brief. A comparison of that quotation with the quotation from Mr. Justice Bradley's opinion in *The City of Norwich*, 118 U. S. 468, set forth at page 6 of respondents' brief, discloses that the former is in essence a paraphrase of the latter. In the appendix to this brief (pp. 30-40, *infra*) we have made a detailed analysis of this reasoning and have shown that it rests upon common law concepts and is in square conflict with the well settled principles of our admiralty law. (See particularly pp. 36-39, *infra*.) We shall, therefore, here merely point out that the fallacy of respondents' argument as to the ship's *in rem* liability being restricted to the *in personam* liability of the charterer under the contracts of affreightment consists in ignoring well settled principles of law. It ignores the fact that the *in personam* liability is merely the basis of a *concurrent* remedy whereby the cargo owner, when it exists and is not subject to statutory limitation, can obtain full recovery and that such liability in the case of a master's bill of lading is created by common law principles of agency.* The maritime lien or right *in rem* is, on the other hand, purely the creation of the maritime law. "This sort of proceeding against personal property is unknown to the common law and is peculiar to the process of courts of admiralty." *The Yankee Blade*, 19 How. 82, at p. 89. At page 24 and pages 31-32 of our main brief, we have pointed out that Judge Ware in *The Phebe*, 1 Ware 263, Fed. Cases No. 11,064, has traced the origin of the maritime lien for breach of a contract of affreightment and has shown that it is derived not from the common law or even from the civil law but had "its origin in the maritime usages

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* It is of interest to recall that at one time some of the Justices of this Court thought that *in personam* liability on contracts of carriage could not be enforced in admiralty. See the dissenting opinions in *N. J. Steam Navig. Co. v. Merchants' Bank*, 6 How. 344, at pp. 416, 418, 421-2.

of the middle ages; and it is to these usages that we must look to asertain its true character" (p. 420 of 19 Fed. Cases).* Judge Ware there went on specifically to point out that "it is by no means correct to say that the liability of the vessel is merely collateral or accessory to that of the owner" (p. 421 of 19 Fed. Cases). Respondents' contentions to the contrary amount to an attempt to escape the well-settled rule as succinctly stated by the present Chief Justice in *Krauss Bros. Lumber Co. v. Dimon S. S. Corp.*, 290 U. S. 117, at p. 121, that once the cargo is laden on board, the ship itself "is made answerable for non-performance", and that, as there pointed out, "this engagement of the vessel or its hypothecation" is a separate liability "as distinguished from the personal obligation of the owner" (p. 121 of 290 U. S.):

Specifically, respondents assert that "there is no liability on the ship unless there is liability upon the owner or operator under the contract of affreightment" (p. 29 of their brief**. Indeed, this assertion appears to be the

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* In spite of our extended discussion of *The Phebe* in our main brief, respondents refer to it only in a single sentence in a footnote at p. 29 of their brief where it is suggested that its rulings are "contrary to prevailing authority". *The Phebe* was specifically approved by this Court in *Schooner Freeman v. Buckingham*, 18 How. 182, at p. 189, which has since been cited with apparent approval many times, including *Osaka Shosen Kaisha v. Lumber Co.*, 260 U. S. 490, at p. 496, which in turn was cited and apparently relied upon in *Krauss Bros. Lumber Co. v. Dimon S. S. Corp.*, 290 U. S. 117, 121, where the present Chief Justice also cited with apparent approval both the *Freeman* case, *supra*, and also *The Rebecca*, 1 Ware 188 (Fed. Cases No. 11,619). In the latter case, Judge Ware set forth the same principles as in *The Phebe*. See our discussion of *The Rebecca* at p. 8, *supra*.

** Previously at p. 27 of their brief respondents stated that "In fact no bill of lading is necessary for the creation of such a lien. *The Saturnus* (C. C. A. 2d), 250 F. 407". (See also the quotation from *The Poznan*, 276 Fed. 418, 432, set forth at lines 14-15 of the footnote on p. 29 of respondents' brief that "Indeed the cargo would have a 'privilege' against the ship for right delivery, even without any bill of lading".) The foregoing admissions also show the inaccuracy of respondents' statement above quoted.

keystone of their argument. Respondents' statement is, however, in direct conflict with the law laid down by this Court in *Schooner Freeman* v. *Buckingham*, 18 How. 182, at p. 189. In that case the same argument was made; and this Court commented upon the fact that it has been

> "* * * laid down by the high court of admiralty in England (*The Druid*, 1 Wm. Rob. 399), that 'in all causes of action which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that *no suit could ever be maintained against a ship, where the owners were not themselves personally liable*, or where their personal liability had not been given up, as in bottomry bonds by taking a lien on the vessel. *The liability of the ship, and the responsibility of the owners in such cases, are convertible terms; the ship is not liable if the owners are not responsible;* and *vice versa*, no responsibility can attach on the owners if the ship is exempt and not liable to be proceeded against" (p. 189 of 18 How.). (Italics ours.)

The Court then continued and stated that

> "*under our admiralty law*, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner" (p. 189 of 18 How.). (Italics ours.)

Respondents' contentions in the instant case that "the lien was inseparably connected with the *in personam* liability of" the "K" Line (p. 34) and that since the "K" Line was freed from this *in personam* liability by virtue of the provisions of the Fire Statute, "it follows that the vessel was likewise freed" (p. 30) are identical with the italicized portions of the opinion in the *Druid* case, *supra*, which

this Court, speaking through Mr. Justice Curtiss, quoted as being contrary to "our admiralty law". The *Freeman* case, *supra*, has often been cited and quoted with full approval. It apparently was one of the main authorities relied upon by this Court in *Krauss Bros. Lumber Co. v. Dimon S. S. Corp.*, 290 U. S. 117, 121.

Respondents quote (p. 31) from the majority opinion of Mr. Justice Holmes in *The Western Maid*, 257 U. S. 419, a case involving a collision between two vessels, one of which was owned by the United States. The first part of this quotation, *i. e.*, the part before the asterisks, to the effect that the rules of the general maritime law govern in our courts only when accepted in this country, affords no support to respondents' attempts to escape the rule of the general maritime law that the liability of the ship *in rem* for breach of the contract of affreightment is primary and not merely collateral to that of the owner since in *Schooner Freeman v. Buckingham*, 18 How. 182, this Court, after referring to Judge Ware's opinion in *The Phebe*, *supra*, specifically said (p. 189):

> "So far as respects such contracts made by the master in the usual course of the employment of the vessel, and entered into with a party who has no notice of any restriction upon that apparent authority, those maritime usages may safely be considered to make part of our law; * * *" (p. 189 of 18 How.).

The other part of the quotation (at p. 31 of respondents' brief) from *The Western Maid*, *supra*, is, we presume, intended to bolster that portion of the lower Court's opinion herein, quoted at p. 30 of respondents' brief, which refers to the concept "of the ship as a jural person capable of wrongdoing" as being but "a bit of mythology, a fiction * * *" (R. 63). We have shown under Divisions II and III of our main brief that this concept is one

fundamental to the operation of our admiralty law* and one that has been employed by Congress in providing machinery for the enforcement of many statutes. It is, however, to be borne in mind that in the instant case the maritime liens sought to be enforced by your petitioners do not so much rest upon the personification of the ship as they do upon its hypothecation as security for the performance of the contracts of carriage evidenced here by bills of lading executed "For Master".

When all is said and done, counsel for the respondents is forced to admit that even under his interpretation of the contract of carriage, there existed "a maritime lien upon the 'Venice Maru' for damage by fire to her cargo". (p. 24 of respondents' brief). This admission of the existence of maritime liens is conclusive of the case in favor of petitioners, unless this Court is prepared to change the concept, long well-settled in our admiralty law, that a maritime lien is a *jus in re* which follows the vessel even into the hands of a *bona fide* purchaser, and which is "to be divested only by a proceeding *in rem*" (p. 89 of 19 How.). A suit *in rem* is not

> "an action against any particular person to compel him to do or forbear any thing; but a claim against all mankind; a suit *in rem*, asserting the claim of the libellant to the thing, as against all the world" (30 Fed. Cas. at p. 876).

It is a suit "to which no person is made a party, save by his voluntary intervention and claim" (30 Fed. Cas. at p. 876). See *The Yankee Blade*, 19 How. 82, particularly at page 89 *et seq.*, from which we quoted in

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* In view of respondents having quoted from Mr. Justice Holmes, it is of interest to recall that in his treatise on *Common Law* he said at pages 26-7: "It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical."

part at pages 19-20 of our main brief. See also the quotation from Mr. Justice Curtis's opinion in *The Young Mechanic*, 2 Curt. 404; Fed. Cas. No. 18,180, as set forth at pages 20-21 of our main brief, as to a maritime lien being a liability separate and distinct from the owner's personal liability and unaffected by any disability to sue such owner. See also quotation from Mr. Justice Grier's opinion in *The Creole*, 2 Wall. Jr. 485, Fed. Cas. No. 13,033, as set forth at pages 28-29 of our main brief, and *The Home*, 18 N. B. R. 557, Fed. Cas. No. 6657, discussed at p. 21, *supra*, and at p. 40, *infra*.

In closing, we deny the charge at p. 24 of respondents' brief that we have abandoned "any defense of the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232", certiorari denied 280 U. S. 603. We have not dwelt on the opinion in that case because it speaks for itself. Our arguments are, we submit, entirely consistent with, and fully support, the position taken by the Court in that decision.

CONCLUSION.

Petitioners' admitted maritime liens against the "Venice Maru" should be enforced irrespective of any exoneration afforded the respondents *in personam* by the Fire Statute.

Respectfully submitted,

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October 19, 1943.

Appendix.

(Analysis of *The City of Norwich*, 118 U. S. 468.)

Respondents' contention that the Fire Statute (Sec. 1 of the Act of March 3, 1851, now 46 U. S. Code, Sec. 182) should be construed to extinguish maritime liens, *i. e.*, the ship's liability *in rem*, as well as to release the owner from liability *in personam* when fire, pleaded as an excuse for non-delivery or damage to cargo, is not due to the design or neglect of such owner personally, basically rests upon their interpretation of the case of *The City of Norwich*, 118 U. S. 468, and particularly upon a paragraph (quoted at p. 6 of their brief) from the majority opinion* written by Mr. Justice Bradley which was in essence paraphrased by the lower Court in the instant case (R. 63). That case was a limitation proceeding instituted under Section 3 of the Act of March 3, 1851 (now 46 U. S. Code, Sec. 183) by the owners of the "City of Norwich" in respect of claims arising out of a collision between that steamer and the schooner "Van Vliet". The claimants-appellants were (a) the schooner owners who had obtained in a prior action (*Wright v. Norwich Co.*, Fed. Cases No. 18,087, aff'd 13 Wall. 104) a decree *in personam* for the loss of their vessel and its cargo (under well settled principles they were also vested with a maritime lien),** and (b) the owners of the cargo on board the "City of Norwich" who had obtained a decree *in rem* in still another action (*Place et al.* v. *The City of Norwich*, Fed. Cases No. 2760) instituted "after the steamboat had been raised and carried to the shore of Long Island and repaired" (p. 470 of 118 U. S.). In this latter action Judge Benedict ruled that the proximate cause of the loss of the cargo was the collision brought about by the negligent navigation of the "City of Norwich" and not the fire which followed the collision and "that the first section of the act (the Fire Statute) can have no application in a case where fire is but an incident of a collision" (p. 781 of 5 Fed. Cas.). In the subsequent limitation proceedings no de-

* Justices Matthews, Miller, Harlan and Gray dissented. The dissenting opinion starts at page 526 of 118 U. S.

** This was pointed out by this Court at page 122 of 13 Wall. when the case was before this Court the first time.

fense based on the Fire Statute was raised. That statute is not mentioned in Mr. Justice Bradley's opinion. In short, the limitation proceedings passed upon by this Court merely involved the proper interpretation and application of Section 3 of the Act of March 3, 1851.

None of the questions actually presented for decision in the *City of Norwich* are directly involved in the case at bar.

The principal question was whether the vessel owner, in order to obtain the benefit of Section 3 of the Act, was required to pay into the limitation fund the proceeds of the insurance received by him in respect of the loss of his ship. This Court held that the phrase, "interest in the vessel", as used in the statute "was intended to refer to the extent or amount of ownership which the party had in the vessel" (p. 493 of 118 U. S.), and was not broad enough to include the proceeds of an insurance policy on the ship. Manifestly, that part of the opinion has no relevancy here.

Two other questions were also presented, viz. (1) at what time should the value of the vessel be taken to fix the amount to be surrendered in the limitation proceedings, *i. e.*, before or after the loss? and if after, at what time thereafter? and (2) whether the limitation provisions of Section 3 were applicable to an action *in rem*, *i. e.*, whether such action could be superseded by the filing of a limitation proceeding and the libellants in such action be restricted to collecting their claims from the value of the vessel surrendered in the limitation proceedings along with other claims against the fund?*

As to the first of these two questions, this Court through Mr. Justice Bradley said (p. 490) that it had

> "been repeatedly answered by the decisions of this Court. We held in *Norwich Co. v. Wright*, and have held and decided in many cases since, that the act of Congress *adopted the rule of the maritime law* as

*The precise question is not here involved. Such of your petitioners as had filed actions *in rem* against the "Venice Maru" prior to the institution of this proceeding (R. 5) have been stayed from proceeding with such actions (R. 12-14—see also p. 54) and have filed their claims herein along with others who had not yet filed suit when this proceeding was begun.

contradistinguished from that of the English law on this subject; and that the value of the vessel and freight after, and not before, the collision is to be taken" (p. 490 of 118 U. S.). (Italics ours.)

Mr. Justice Bradley concluded that the vessel was to be appraised at her value at the end of the voyage and said (pp. 491-2):

> "This conclusion is corroborated by Sec. 4285, which declares that it shall be a sufficient compliance with the requirements of the law if the owner shall transfer his interest in the vessel and freight to a trustee for the benefit of the claimants. In most cases this cannot be done until the voyage is ended, for, until then, the embezzlement, loss, or destruction of property cannot be known.
>
> *And this was manifestly the maritime law*, for by that law the abandonment of the ship and freight (when not lost) was the remedy of the owners to acquit themselves of liability; and, of course, this could only be done at the termination of the voyage. If the ship was lost, and the voyage never completed, the owners were freed from all liability. Boulay-Paty, Droit Com. Mar., tit. III. sec. 1, vol. 1, pp. 263, 275, &c.; Emerigon, Contrats a la grosse, ch. 4, sec. 11, Secs. 1, 2; Valin, Com. lib. II. tit. VIII. art. II; Consolato del Mare, chs. 34, (141) 186, (182) 227, (194) 239; 2 Pardessus, Collection des lois Maritimes anterieur au XVIII. Siecle; Cleirac, Nav. de Rivieres, art. XV." (Italics ours.)*

He went on to point out that (p. 492) "any salvage operations, undertaken for the purpose of recovering from the bottom of the sea any portion of the wreck, after the disastrous ending of the voyage as above supposed, can

* See also *The Phebe*, 1 Ware 263, Fed. Cases No. 11,064, where Judge Ware demonstrated that under the general maritime law the liability of the vessel for the breach of the master's bill of lading was the primary one "and that of the owner was not personal but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditor." 19 Fed. Cas. at p. 421. Judge Ware there also pointed out that both ship and freight were hypothecated to secure performance of the master's contract. See also *The Scotland*, 105 U. S. 24 at p. 28.

have no effect on the question of the liability of the owners" (p. 492 of 118 U. S.).

This position is consistent with the rule of the general maritime law that, in the absence of personal fault, the vessel owner's liability is restricted to the capital at risk on the voyage on which the loss occurs. *The Rebecca*, 1 Ware 188, Fed. Cases No. 11,619; *The Phebe*, 1 Ware 263, Fed. Cases No. 11,064; see also Mr. Justice Bradley's observations in *Norwich Co. v. Wright*, 13 Wall. 104, at p. 116, and those of Mr. Justice Brown in *The Main v. Williams*, 152 U. S. 122, at p. 131.

In the case at bar petitioners do not seek to recover from the "Venice Maru" anything in excess of the ship and pending freight as represented by the stipulation filed herein.

As to the question whether the plea of limitation of liability could be received in an action *in rem*, *i. e.*, whether such an action was superseded by a limitation proceeding and the libellant's rights transferred to the limitation fund representing the value of the vessel, Mr. Justice Bradley stated (p. 502) that the argument to the contrary there advanced

> "overlooks the fact that the law gives a twofold remedy—surrender of the ship, or payment of its value; and declares that the liability of the owner, in the cases provided for, shall not exceed the amount or value of his interest in the ship and freight.* This provision is absolute, and the owner may have the benefit of it, not only by a surrender of the ship and freight, but by paying into court the amount of their value, appraised as of the time when the liability is fixed. This, as we have seen, enables the owner to reclaim the ship, and put it into complete repair, without increasing the amount of his liability. *The absolute declaration of the statute*, that his liability shall not exceed the amount or value of the ship and freight, to wit, at the termination of the voyage, *has the effect, when that amount is paid into court, under judicial sanction*, of discharging the owner's liability, and thereby *of extinguishing the liens on the vessel itself and of transferring those*

* This is precisely what is due in the *in rem* action. *The Phebe*, *supra*, see appendix our main brief at page 54.

liens to the fund in court. This is always the result when the owner is allowed to bond his vessel by payment of its appraised value into court, or by filing a stipulation with sureties in lieu of such payment. *The vessel is always discharged from the liens existing upon it,* when it has been subjected to a judicial sale by order of the admiralty court, *or when it has been delivered to the owner on his stipulation with sureties.*" (Italics ours.)*

From the foregoing it is clear that the decision of this Court in no way affected the existence of the maritime liens against the "City of Norwich", but merely held that they were transferred to the fund in the court representing her value at the end of the voyage during which such maritime liens arose, which both under the statute and the maritime law was limited to the value of the vessel and her pending freight. *The Phebe, supra.* See page 54 of our main brief. The value of the "City of Norwich" after the collision had been found to be $2,500 (p. 471 of 118 U. S.) whereas her value at the time the *in rem* libels were filed after she had been salvaged and repaired, was appraised as $70,000 (p. 471 of 118 U. S.). The appellants there contended that they were entitled to recover that latter sum.

Mr. Justice Bradley dealt with this contention at page 503 of 118 U. S. and ruled that "the claim that the lien attaches to the repairs and betterments which the owner puts upon the vessel after the amount of his liability has been fixed is repugnant to the entire drift and spirit of the statute" (p. 503 of 118 U. S.). Such a ruling in that case was in complete harmony with the general maritime law as to the extent of the liability of an innocent shipowner

* The rule that the giving of a bond transfers the lien to it and discharges the vessel is well-settled. *The Susana*, 2 F. (2d) 410, 412 (C. C. A. 4); *Gray v. Hardware Co.*, 32 F. (2d) 876 (C. C. A. 5), and cases cited there at page 878. It is also well settled that in a purely *in rem* action, no decree *in personam* can be entered for any damages which the value of the vessel or bond fails to satisfy. *The Monte A*, 12 Fed. 331, at pp. 334-5. See also *The Virgin*, 8 Peters 538, and *The Volant*, 1 W. Rob. 383, 166 Eng. Reprints 616. The same rule applies in favor of stipulators for value. *The Ann Caroline*, 2 Wall. 538 at pp. 548-9.

for the acts of the master and crew of his vessel. As Mr. Justice Bradley had previously pointed out in *Norwich Co.* v. *Wright*, 13 Wall. 104, at pp. 119-120, and also in *The Scotland*, 105 U. S. 24, at p. 28, the purpose of the Act of March 3, 1851, was to incorporate into our jurisprudence the rule of the general maritime law on this point which "was not received as law in England nor in this country until made so by statute" (p. 28 of 105 U. S.). Under the general maritime law, the vessel owner's liability, in the absence of personal fault, was restricted to the capital at risk on the voyage on which the loss occurred. *Norwich Co.* v. *Wright, supra*, at page 116, and *The Scotland, supra*, at page 28, both of which refer to *The Rebecca*, 1 Ware 188, Fed. Cases No. 11,619, for further authorities. To like effect see also *The Phebe*, 1 Ware 263, Fed. Cases No. 11,064; Appendix C of our main brief.* The reason for the rule is particularly plain in cases involving maritime liens (such as those in the case at bar) arising from the hypothecation of the vessel and freight for the fulfillment of the obligations created by a master's bill of lading. *The Phebe, supra* (see p. 54 of our main brief). It would be obviously unfair to hold as security for such obligation any additional capital which an innocent vessel owner might have invested in a subsequent voyage. The maritime law is clear on this point that nothing is hypothecated beyond the vessel and freight on the particular voyage involved (*The Phebe, supra*); and obviously when a voyage is broken up by the vessel's sinking as was the case in *The City of Norwich*, any sums expended either by way of salvage or repairs have nothing to do with that voyage and are not subject to the maritime lien.

Mr. Justice Bradley's ruling that in cases where the shipowner establishes his right to the benefits of the Act of March 3, 1851, *i. e.*, shows that the loss occurred without his personal fault or knowledge, the lien for damage occurring on that voyage does not attach to any increase in the "value of the ship (which) may have come to be

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* Compare the full liability imposed on the vessel owner for loss of cargo by fire not due to the owner's personal fault by the ruling in *N. J. Steam Navig. Co.* v. *Merchants' Bank*, 6 How. 344, which admittedly led to the passage of the Act of March 3, 1851. See page 9 of respondents' brief as well as note on page 8 of our main brief.

by means of alterations or repairs" (p. 503 of 118 U. S.) made by the owner subsequent to the voyage on which the amount of his liability was fixed, precedes on the same page the quotation from his opinion which is set forth at page 6 of respondents' brief and which starts with the sentence reading: "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles" (p. 503 of 118 U. S.). We submit that a correct interpretation of these remarks in view of their context is that Mr. Justice Bradley merely was giving an additional reason for his ruling and only meant that an owner's interest in the vessel on a subsequent voyage after fresh capital has been added, *i. e.*, his interest in the vessel over and above its value at the time the maritime lien attached,* could not be held liable or sold in cases where, under the statute, the owner was not personally liable for any amount in excess of the maritime lien which had been transferred to the fund paid by him "into court under judicial sanction". This would seem particularly so since he had just pointed out on the preceding page that the liens against the "City of Norwich" had been transferred to the limitation fund and the vessel itself thereby discharged.

If, however, by the language under discussion Mr. Justice Bradley intended to go further and to rule that an admiralty action *in rem* to enforce a maritime lien was in fact merely another means of enforcing a personal liability,** then such statements are *obiter dicta.* Such a ruling would ignore the fact that by the well settled maritime law the ship becomes bound *in rem* by the contract of the master or of her bareboat charterer wholly independently of any liability on the part of her

* In this connection we might point out that a maritime lien, or *jus in re*, is inchoate until it is carried into effect by judicial process at which time it "relates back to the period when it first attached". *See The John G. Stevens*, 170 U. S. 113 at p. 115, and cases there cited, and also p. 122 where Mr. Justice Gray, speaking for this Court, said: "The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision".

** The paraphrase employed by the lower Court in the instant case has this effect (R. 63).

owner; and would be squarely in conflict with the settled principles of the maritime law as to the nature of an admiralty proceeding *in rem* as laid down both before and since.* It could only rest upon common-law doctrine.** In this latter connection, it is to be noted that Mr. Justice Bradley quotes from his own opinion in *Boyd v. United States*, 116 U. S. 616, 637, that a proceeding *in rem* for forfeiture under the customs laws is in effect "a proceeding against the owner of the property as well as against the goods". This statement is squarely in conflict with this Court's holding in the *Brig Malek Adhel*, 2 Howard 210; *The Scow 6-S*, 250 U. S. 269; and numerous other decisions of this Court discussed under Heading III of our main brief at pages 36 *et seq.*

The *Boyd* case was an information for forfeiture of goods under Section 12 of the Act of June 22, 1874 (18 Stat. 186), which declared that "any owner, importer, consignee, agent or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of any imported merchandise" whereby the United States shall be deprived of lawful duty thereon, shall be subject to a fine or imprisonment "and, in addition to such fine, such merchandise shall be forfeited" (18 Stat. 186). Pursuant to the provisions of Section 5 of the same Act, the trial Court by order had compelled the claimant to produce an invoice covering another transaction which was received in evidence over the claimant's objection. The question thereby presented was whether this procedure contravened the claimant's constitutional rights safeguarded by the Fourth and Fifth Amendments. This Court held that it did in that case on the ground (p. 638) that

"although the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party,

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* *The China*, 7 Wall. 53, and other cases cited under Division II of our main brief, pages 26-34. See also *The Yankee Blade*, 19 How. 82, 89, and cases cited at pages 19-22 of our main brief.

** That the principles and rules followed in admiralty are different from, and are to be contradistinguished from, those of the common law, has been recognized from the earliest times. *Manro v. Almeida*, 10 Wheat. 473, at p. 488. See also 1 Stat. 276. The action *in rem* to enforce a maritime lien "is unknown to the common law, and is peculiar to the process of courts of admiralty" per Grier, J., in *The Yankee Blade*, 19 How. at p. 89.

> he is, nevertheless, the substantial party to the suit: he certainly is so, after making claim and defence: and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense" (p. 638 of 116 U. S.).

It is to be seen that personal rights wholly separate and distinct from the question of the liability of the *res* to forfeiture were involved in that quasi-criminal proceeding. In *Stone v. United States*, 167 U. S. 178 at pp. 187-188, this Court subsequently took occasion to point out that the rules applicable in such a type of proceeding "can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property" (p. 188 of 167 U. S.). A fortiori, such ruling can have no application in an admiralty proceeding to enforce rights *in rem* created by the maritime law which are wholly distinct from any liability of the vessel owner *in personam*.

The common-law basis of the ruling in the *Boyd* case, as set forth in *The City of Norwich, supra*, is farther emphasized by the reliance there placed by Mr. Justice Bradley on the language of Vaughan, *C. J.*, in *Sheppard v. Gosnold*, Vaugh. 159. In that case (124 Eng. Reprints 1018), the Crown asserted a claim for duties in respect of goods washed up on shore and taken by a landowner as his own. The case could have been decided by a mere holding that the statute imposing the duties was not applicable because it related solely to goods intentionally brought into the Kingdom. The Court of Common Pleas, however, went further in its observations, which were quite sound common law doctrine, but at variance with the principles of our maritime law. Contrast the common law view of Chief Justice Vaughan, when he says: "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are", with those of Chief Justice Marshall in *United States v. The*

Schooner Little Charles, 1 Brock. 347, 354, Fed. Cases No. 15,612, where he said:

> "But this is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel, which is not the less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable that the vessel should be affected by this report" (p. 982 of 26 Fed. Cas.).

Chief Justice Marshall's views were approved by this Court in *United States v. Brig Malek Adhel*, 2 How. at p. 233. Compare also *The China*, 7 Wall. 53, and other cases cited in our main brief. The doctrine laid down by Vaughan, *C. J.*, is in square conflict with the rule adopted by Congress in the Airplane Statute (49 U. S. Code, Section 181 sub. (b)), discussed at pages 36-38 of petitioners' main brief. In *U. S. v. Batre*, 69 F. (2d) 673, the leading case construing that statute, it was held that where an airplane (in so far as the holder of a chattel mortgage on the plane was concerned) was unintentionally brought into the United States contrary to law, such circumstance did not prevent the forfeiture.

Mr. Justice Bradley's remark in *The City of Norwich*, *supra*, that "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles",* is clearly based on the common law concepts of the *Boyd* and the *Sheppard* cases, *supra*, and is not only in square

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* In the instant case Judge Hand said that "To say that an owner is completely exonerated although one may arrest his ship and sell it, is a contradiction in terms" (R. 63).

conflict with the admiralty cases, just referred to.* But is also in conflict with this Court's recent holdings in *Goldsmith Grant Co. v. United States*, 254 U. S. 505, and in *Van Oster v. Kansas*, 272 U. S. 465, and the other cases discussed under Division III of our main brief. It will be recalled that in both the *Grant* and the *Van Oster* cases, there was no liability whatsoever on the part of the car owner, but the automobile was nevertheless held liable to forfeiture.

We have also pointed out at pages 7-8, *supra*, that Mr. Justice Bradley's opinion in this case should be read and interpreted in the light of his opinion in the companion case of *Norwich Co. v. Wright*, 13 Wall. 104.

In summary, we submit that the actual decision of this Court in *The City of Norwich*, 118 U. S. 468, does not support respondents' position in the instant case and that their interpretation of the language used by Mr. Justice Bradley at p. 503 of his opinion, which was here paraphrased by Judge Hand, is squarely contrary to the well settled principles of admiralty law as laid down in both prior and subsequent authorities which fully support your petitioners' position herein.

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* In addition to those and the other cases in our main brief, attention is directed to the decision of Judge (later Mr. Justice) Brown in *The Home*, Fed. Cases No. 6657, a libel *in rem* to enforce a lien for supplies furnished the vessel upon the order of a demise charterer. The latter went into bankruptcy and proposed a composition with his creditors which was accepted by the requisite number including the libellant. In enforcing the lien, Judge Brown pointed out: "Under general admiralty rule 12, a person furnishing supplies to a vessel has a triple security for the payment of his claim: (1) The owner, a charterer being regarded as the owner *pro hac vice*; (2) the master; (3) the vessel itself. A failure to collect from either does not impair his remedy against the others. He may pursue them successively until his entire debt is paid. (Cases) * * *; but there are in fact three independent though not joint debtors in this case, viz.: The charterer, the vessel, and the master, and *the release of one does not impair the remedy against the others*" (pp. 446-7 of 12 Fed. Cas.). (Italics ours.) See also Mr. Justice Curtis' ruling in *The Young Mechanic*, Fed. Cases No. 18,180 as quoted at page 21 of our main brief.